

No. 66312-7-1

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GLORIA BRIGGS, et. al,

*Appellant(s),*

v.

SEATTLE SCHOOL DISTRICT NO. 1,

*Respondent(s).*

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**Respondent Seattle School District's Responsive Brief**

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## I. Introduction

This action is an appeal of decisions made by the King County Superior Court in an administrative review filed pursuant to Revised Code of Washington Chapter 28A.645. RCW Chapter 28A.645 is a statutory provision that grants a Superior Court appellate jurisdiction to conduct an administrative review of decisions made by a school board or school official. The Appellants are individuals<sup>1</sup> who purported to be impacted by decisions of the Board of Directors ("School Board") of Respondent Seattle School District No. 1, ("the District") made on January 29, 2009 related to the use of several school buildings. A number of the Appellants were dismissed from the matter for lack of standing. After multiple hearings on the Appellants' arguments related to the meaning and application of the administrative record provision contained within RCW Chapter 28A.645, and a failed attempt to obtain direct interlocutory review by the Supreme Court, the Superior Court determined that the School Board did not act arbitrarily, capriciously, or contrary to law when it determined to close the Mann and Van Asselt buildings on January 29, 2009. The decisions of the Superior Court challenged in this appeal are well supported by fact and law, and should be upheld.

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<sup>1</sup> This matter is a consolidation of King County Superior Court Cause Nos. 09-02-10820-0 and 09-2-10708-4 SEA, both of which were filed with Gloria Briggs as the lead appellant. *CP 17-18*. Ms. Briggs, a resident of the Tukwila School District, was among the Appellants dismissed for lack of standing. *CP 858-60*.

It should also be noted that this matter, the resolution of which was delayed by the actions of the Appellants and their counsel for a full year, is now moot. The relief requested initially – an order enjoining the implementation of the School Board decisions – is an impossibility, as the schools at issue have been closed for nearly two full academic years.

## **II. Counterstatement of Issues**

1. Were the Superior Court's December 4, 2009 and December 15, 2009 Orders directing supplementation of the administrative record appropriate remedies to address Appellants' motions regarding the sufficiency of the same?

2. Did the Superior Court properly reject Appellants' "Motion to Strike" their case for lack of subject matter jurisdiction on June 1, 2010?

3. Did the Superior Court properly determine on June 1, 2010 that Appellants Briggs, Changebringer, Davis, Driver, and Grauer, who were not actually impacted by the School Board decisions being challenged, lacked standing to raise an appeal filed pursuant to RCW Chapter 28A.645?

4. Did the Superior Court properly exclude irrelevant hearsay evidence that post-dated the School Board decisions being challenged below?

5. Is this matter moot given that the School Board decisions that are the subject of this challenge have now been fully implemented for nearly two full academic years?

### **III. Statement of the Case**

#### **A. Statement of Facts**

The District has been engaged in efforts to ensure the effective and efficient use of its school buildings for several years. *CP 79-81*. In the fall of 2008, the District learned it would be facing at least a \$24 million budget shortfall for the 2010 fiscal year. *Id.* The deficit, coupled with repeated findings that excess capacity was significantly draining fiscal resources, caused the School Board to evaluate balancing its geographic capacity needs. *Id.*

Pursuant to the statute on closing schools for instructional purposes, RCW 28A.335.020, the School Board has a policy setting out the process for closing school buildings. *Id.* at 82. On November 25, 2008, the then-Superintendent took the first step called for under this Policy by presenting a 146-page "Preliminary Recommendations on School Building Closure and Program Relocations." *Id.* These Preliminary Recommendations proposed the closure of seven school buildings and the relocation of several programs to alternative sites. *Id.* On December 15 and 16, 2008, seven site-specific hearings were held at each school building proposed for closure. *CP 83-82*. Testimony from these hearings

was transcribed and posted online. *Id.* Pursuant to RCW 28A.335.020, notices for these hearings were published weekly for two consecutive weeks in two newspapers of general circulation. *Id.* Additionally, the District also ran notices in nine local community newspapers, sent notices to all current families through U.S. mail, posted the hearing schedule on the District's website, ran public service announcements on television and radio, and distributed flyers throughout the community. *Id.* In addition to the site-specific hearings, the District hosted general community workshops on December 4 and 6, 2008, and individual community meetings for each program where a change was proposed. *Id.* The School Board also took testimony related to the Preliminary Recommendations at its regularly scheduled meetings. *Id.*

On January 6, 2009, the Superintendent completed the next step required under the closure policy, the "Presentation of the Superintendent's final recommendation for school closure(s)." CP 85. These "Final Recommendations on Building Closure and Program Relocation" were contained within a 188-page report intended to provide the School Board with an analysis as to the effects of the proposed closures and programmatic changes. *Id.* The closure of five school buildings was recommended, along with nine programmatic changes. After the release of the Final Recommendations, a final general two-hour public hearing was held on January 22, 2009. *Id.*

On January 29, 2009, the School Board voted 5-2 to close the five buildings and to approve the programmatic changes at a meeting that was open to the public, was aired on television, and was available for viewing online. *CP 86-87*. With respect to the Mann and Van Asselt buildings, whose closure was ultimately at issue before the Superior Court below, the School Board choose to close two buildings that were in ill repair, while preserving two successful academic programs by relocating them to other buildings. The School Board directed immediate implementation of actions necessary to carry out its decisions. *Id.* Staff and students were moved in accordance with the decisions, and have been at their new locations for the last two academic years. *Supp. CP – (Declaration of Ron English)*. The Mann and Van Asselt buildings have subsequently been leased to third parties. *Id.* The Mann building houses a not for profit organization focused on social justice projects, and the Van Asselt building houses a private religious school. *Id.*

#### **B. Procedural History of the Case**

It is undisputed that Appellants were challenging the decisions made by the School Board on January 29, 2009. It is also undisputed that Appellants served Notices of Appeal upon the School Board on March 2, 2009, within RCW 28A.645.010's statute of limitations. On March 23, 2009, as required by RCW

28A.645.020, the District submitted a "Transcript of Evidence" to serve as the administrative record for the matter. *Supp. CP* – (Notice of Filing of Transcript of Evidence). This administrative record was accompanied by a Certification from Holly Ferguson, the lead staff member assigned to the project, stating:

I, Holly Ferguson, certify that the attached documents and digital video disks constitute the 'transcript of the evidence and the papers and exhibits relating to the decision' of the Seattle School Board to close five school buildings for instructional purposes. The documents can also be found online at: <http://www.seattleschools.org/area/capacity/index.xml> and <http://www.seattleschools.org/area/board/index.dxml>. The contents of the digital video disks may also be found online at: <http://www.seattlechannel.org/videos/watchVideos.asp?program=schools>.

An administrative review hearing was scheduled for September 28, 2009. However, after briefing was completed but prior to the date scheduled for the hearing, Appellants filed a summary judgment motion. *CP 132-50*. The basis of this motion was a belief that the record was insufficient because it contained summaries of public input rather than individual emails and letters, and because the District had submitted digital video recordings of its meetings rather than written transcripts. *See id.*

A response and reply were timely submitted, and a hearing on Appellants motion was held on November 2, 2009. *CP 164-99, 279*. The Superior Court made an oral ruling denying Appellants'

motion, and issued an order directing the District to supplement the record by November 17, 2009. *Id.* at 279. The Superior Court also orally set a new administrative review hearing date and scheduled a second round of briefing in advance of the hearing. *Id.* at 531-37.

The District complied with the Superior Court's ruling, filing a supplementation of the record and accompanying certifications on November 17, 2009. *CP* 280-85. The supplementation was accompanied by certifications that stated the following:

I, Thomas Redman, am the Capital Projects Community Liaison for Seattle School District No. 1, d/b/a Seattle Public Schools ("the District"). In my capacity as the District's Capital Projects Community Liaison, I coordinated community workshops and public hearings related to the District's Capacity Management efforts, which culminated with the School Board's January 29, 2009 decision to close five school buildings for instructional purposes and make nine programmatic changes. I certify that the documents marked as Transcript of Evidence 2325-2720 are all of comment cards collected at community workshops and public hearings related to the School Board's January 29, 2009 decisions, sign-in sheets for the public hearings, and notes taken at the community workshops held on December 4 and 6, 2008.

...

I, Pamela Oakes, am the Senior Administrative Assistant to the Board of Directors of the Seattle School District No. 1, d/b/a Seattle Public Schools ("the School Board"). In my capacity as the School Board's Senior Administrative Assistant, I open all letters or other written communication sent to the School Board or individual School Board Directors

(unless marked personal or confidential) via U.S. Mail, faxed, or delivered in person to the School Board's Office. I distribute all letters or other written communication to the Directors, retaining a copy to be archived. I certify that the documents marked as Transcript of Evidence 2722-2749 are the letters or other written communication sent to the School Board or individual School Board Directors via U.S. Mail, faxed, or delivered in person to the School Board's Office related to the District's Capacity Management efforts that culminated with the School Board's January 29, 2009 decision to close five school buildings for instructional purposes and make nine programmatic changes.

In my capacity as the School Board's Senior Administrative Assistant, I also attend School Board meetings, where I am responsible for distributing to the Directors any handouts or written materials provided by community members, retaining copies to be archived. I certify that the documents marked as Transcript of Evidence 2751-2963 are the handouts and other written materials provided by community members at School Board Meetings which related to the District's Capacity Management efforts that culminated with the School Board's January 29, 2009 decision to close five school buildings for instructional purposes and make nine programmatic changes

...

I, April Johnson, am a Senior Systems Engineer for Seattle School District No. 1, d/b/a Seattle Public Schools ("the District"). At the request of Senior Assistant General Counsel Shannon McMinimee, I did a search of the District's server to locate all emails sent to [capacity@seattleschools.org](mailto:capacity@seattleschools.org). There were 247 emails sent to that address. I also did a search of the District's server to locate all emails sent to [SchoolBoard@seattleschools.org](mailto:SchoolBoard@seattleschools.org) between October 29, 2008 and January 29, 2009 that contained any of the following words:

Closure  
Capacity Management  
Preliminary Recommendations  
Final Recommendations  
TT Minor  
Pinehurst  
AS #1  
Van Asselt  
Genesee Hill  
Pathfinder  
Mann  
Meany  
Nova  
Old Hay  
Lowell  
African American Academy  
Cooper  
APP

This resulted in the generation of over 10,000 records. I certify that the digital video disk marked as Transcript of Evidence 3308 contains the results of this email search in pst files.

...

I, Amy Carter, am a Senior Legal Assistant for Seattle School District No. 1, d/b/a Seattle Public Schools ("the District"). At the request of Senior Assistant General Counsel Shannon McMinimee, I printed all of the emails sent to capacity@seattleschools.org, which were provided to me as .pst files by Senior Systems Engineer April Johnson. I certify that the documents marked as Transcript of Evidence 2937-3307 are the emails I printed.

Ms. Carter subsequently filed a declaration on December 10, 2009 stating:

At the request of Senior Assistant General Counsel Shannon McMinimee, I printed all of the emails sent to capacity@seattleschools.org, which were provided to me as .pst files by Senior Systems Engineer April Johnson. These documents were marked as Transcript of Evidence 2937-3307. I inadvertently did not print the attachments to the emails sent to capacity@seattleschools.org. When I was made aware of this, I reprinted all of the emails that were sent to capacity@seattleschools.org that had attachments, this time also printing the attachments. These emails with attachments have been marked as 'Transcript of Evidence 3308-3405.' Although the email marked as TE 3403 indicates it had attachments, the documents attached to this email were not in a form that could be opened on the District's computer system. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

*CP 434-36.*

Appellants moved for reconsideration of the oral denial of the summary judgment motion on November 24, 2009. *Id. at 286-94.* The Superior Court ruled that this motion was properly considered a motion regarding the sufficiency of the District's supplementation of the record rather than a motion for reconsideration. *Id. at 393*

On December 4, 2009, the Superior Court issued a written order memorializing the November 2, 2009 oral ruling denying Appellants motion for summary judgment. *CP 389-92.* The Parties were directed to work together to determine a hearing date and set a briefing schedule by December 9, 2009. *Id.* The District attempted to work with Appellants to determine a hearing date and set a briefing schedule, but on December 9, 2009, Appellants'

counsel filed a statement indicating that he was refusing to comply with the Court's prior order. *Id.* 410, 395-402.

On December 15, 2009, the Superior Court issued an order on the motion regarding the sufficiency of the District's supplementation. *CP* 571-75. In that order, the Superior Court determined that the record was not yet adequate because it did not include written transcripts of School Board meetings.<sup>2</sup> *Id.* at 573. The Parties were again directed to determine a hearing date and set a briefing schedule, this time by January 8, 2010. *Id.* at 574. Again, the District attempted to work with Appellants to do so, and again Appellants' counsel again filed a statement setting forth that he was refusing to comply with the Court's order. Appellants then filed a Motion to Certify the issue of the denial of their summary judgment motion to the Supreme Court, which was denied by the Superior Court on January 21, 2010. *Supp CP ---* (Order Denying Motion to Certify).

Pursuant to the Superior Court's December 15, 2009 supplementation order, the District filed and served verbatim written transcripts seven School Board meetings. *Supp CP ---* (Notices of Filing of Supplementation of Transcript of Evidence). Each transcript was certified by the Court Reporter who prepared it. The

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<sup>2</sup> The Court and Appellants had been provided with Digital Video Recordings of the meetings on March 23, 2009, as Digital Video Recording is the manner in which School Board meetings are memorialized.

District also provided Appellants and the Superior Court with paper copies of emails initially submitted in electronic form. *CP 617-23*.

On February 26, 2010, Appellants filed a motion seeking to have the matter returned to the School Board for lack of subject matter jurisdiction. *CP 576-84*. On March 23, 2010, the District filed a motion to dismiss certain Appellants for lack of standing, and to narrow issues in the case to those for which the remaining Appellants had standing to challenge. *Id. at 698-727*. The Court denied Appellants' motion and granted the District's motion on June 1, 2010. *Id. at 856-60*. The granting of the District's motion also narrowed the decisions being reviewed to just those that the remaining Appellants had standing to challenge. *Id.*

Despite the Superior Court's denial of Appellants certification request, they continued to seek direct discretionary review of the denial of their motion for summary judgment from the Supreme Court. *CP 844-53*. The Supreme Court Commissioner denied Appellants' request, stating that their arguments were not supported "in the decisions they cite," and were "contrary to decisions involving predecessor statutes." *Id. at 850*. Appellants then filed an unsuccessful Motion to Modify the Commissioner's Ruling. *Id. at 1142-43*.

On the date Appellants' second brief on the merits was due, two briefs were filed, one by counsel Scott Stafne and one by the

Appellants themselves.<sup>3</sup> *CP 862-66, Supp CP ---* (Appellants' Opening Brief) . The Brief filed by Appellants stated: "Appellants are now representing themselves pro se in this appeal," and identified that unlike their counsel, they have no dispute with the administrative record: "Under RCW 28A.645.020, within twenty days of service of the petition, the school district must provide a 'complete transcript of the evidence and papers and exhibits relation to the decision for which a complaint has been filed', with such filings to be certified to be correct. The District has filed this transcript with the Court." *Supp. CP at ---*.

As two hearing briefs were filed on behalf of the Appellants rather than one, the District raised the issue to the Superior Court. *CP 888-89*. During a telephonic conference that occurred on July 9, 2010, the Superior Court converted Mr. Stafne's brief to be yet another motion the adequacy of the record, and reset the dates related to the filing of a Hearing Brief by the District and a Reply on the merits by the Appellants. *Id.* Mr. Stafne then filed documents professing that he intended to continue as counsel of record, but that his clients also would be representing themselves on particular

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<sup>3</sup> Mr. Stafne was counsel of record in several other matters adverse to the District. He advanced similar arguments related to the meaning and application of RCW 28A.546.020 in those matters, and every court considering these arguments, including the Supreme Court through its Commissioner and directly on Motions to Modify, rejected his particular and peculiar interpretation of RCW 28A.546.020. See *CP 871-887, 1094-1102*.

issues.<sup>4</sup> *Id.* at 890-948. With this filing, Mr. Stafne attached a Washington State Auditor's Report dated June 21, 2010 ("Auditor's Report"). *Id.* The District moved to exclude the Auditor's Report from consideration at the administrative review hearing under a number of evidentiary basis. *Id.* 1094-1102.

The Superior Court then denied Mr. Stafne's fourth motion regarding the record, and set an administrative review hearing on the merits for August 30, 2010. *CP* at 1092-93. The Superior Court also granted the District's motion to exclude the Auditor's Report. *Id.* at 1146-47. When the hearing on the merits finally occurred, Appellants Abdullah and Wheat argued their case as pro se parties. *CP* 1148-49. After considering the briefs filed and the oral argument presented, the Superior Court ruled that the School Board's decisions to close the Mann and Van Asselt buildings were not arbitrary, capricious or contrary to law. *Id.* at 1150-52.

### **C. Contents of the Administrative Record Below**

As in any administrative review under the arbitrary, capricious, or contrary to law standard, the Superior Court was to make its determination based upon a review of the record before the administrative decision maker. *See Hatrick v. North Kitsap School District*, 81 Wn.2d 688, 504 P.2d 302 (1972), *Weems v.*

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<sup>4</sup> The District objected to this, as the rights of self-representation and representation by counsel cannot be properly exercised at the same time. *CP* 1105-14, 1126-32.

*North Franklin School District*, 109 Wn. App. 767, 37 P.3d 354 (2002), *c.f. Wn. Independent Tel. Ass' v. Wn. Util. & Transp. Comm'n*, 110 Wn.App. 498, 518, 41 P.3d 1212 (2002), *aff'n*, 149 Wn.2d 17, 65 P.3d 319 (2003).

The administrative record submitted by the District was comprised of 25,304 pages of documents and seven digital video disks of materials "relating to" the School Board's January 29, 2009 decisions, including: (1) every document required to be generated under law or policy related to the closure of schools; (2) Agendas, Presentations, Resolutions, Motions, and Meeting Minutes from all School Board meetings and work sessions where building closures and programmatic changes were discussed; (3) invoices for newspaper advertisements of meetings and hearings; (4) transcripts of every hearing required under law or policy related to the closure of schools<sup>5</sup> (5) print-outs of the website maintained by the District related to closures and programmatic changes; (6) sign-in sheets, individual comment cards, notes, and summaries of the feedback solicited at community meetings and hearings; (7) emails sent to an address dedicated to closures and programmatic changes and summaries of email sent to that address; (8) emails, letters, or other written communications sent to or from the School

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<sup>5</sup> The Superior Court also considered a "hearing speaker roster" for the hearing held regarding the closure of the Mann building, which was provided by a community member who had attended the hearing and retained a copy of the roster. *CP 1150-52*.

Board regarding building closures and programmatic changes; (9) emails sent to or from the Superintendent regarding building closures and programmatic changes; (10) handouts provided by community members at School Board meetings; (11) verbatim written transcriptions of the School Board meetings at which closure and programmatic changes were discussed; and (12) various other materials related to the decisions being challenged. *CP 280-85, 434-36, Supp CP ---* (Notice of Filing of Transcript of Evidence and Certification), *Supp CP ---* (Notices of Filing Supplementation of the Record). All of these materials were certified by the lead staff member for the closure effort or the individuals responsible for regularly collecting and maintaining such documents and electronic records. *Id.*

Contrary to Appellants' claims, the transcript of evidence ***always*** included commentary from those not in agreement with the proposals, including the testimony provided at hearings and before the School Board. *Supp CP ---* (Notice of Filing of Transcript of Evidence and Certification). In fact, the record was rife with the input of the Appellants, including their testimony at public hearings and School Board meetings and written materials and emails they provided to the School Board. Appellants have never disputed that they had an opportunity to be heard prior to the decisions being made, or that they were actually heard by the School Board. They just disagreed with the decisions the School Board made.

## IV. Argument

### A. Standard of Review

#### 1. Revised Code of Washington Chapter 28A.645

As was identified above, this action was a challenge brought under RCW Chapter 28A.645, a statute that confers subject matter jurisdiction upon a superior court to hear challenges to certain decisions made by school officials or school boards. Despite the facial language of RCW 28A.645.030, the Superior Court was not conducting a de novo review of the School Board's capacity management decisions. True de novo review is only available under RCW 28A.645 for quasi-judicial decisions made by school boards or school officials. *Haynes v. Seattle School Dist.*, 111 Wn.2d 250, 253-54, 758 P.2d 7 (1988), *cert. denied*, 489 U.S. 1015 (1989); *Yaw v. Walla Walla Sch. Dist.*, 106 Wn.2d 408, 413, 722 P.2d 803 (1986). In reviewing an administrative or policy-making decision of a school board, the Superior Court was to use the traditional administrative review standard of whether the school board acted in a manner that was arbitrary, capricious, or contrary to law. *Haynes*, 111 Wn.2d at 253-55; *Yaw*, 106 Wn.2d at 413. "This standard is highly deferential to the administrative fact finder." *Motley-Motley, Inc. v. State*, 127 Wn.App. 62, 72, 110 P.3d 812, 818 (2005) (citing *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000)). "The

agency decision is presumed correct and the challenger bears the burden of proof." *Providence Hosp. v. State*, 112 Wn.2d 353, 355-56, 770 P.2d 1040 (1989). "[T]he scope of review of an order alleged to be arbitrary or capricious is narrow, and the challenger carries a heavy burden." *Brown v. State*, 94 Wn. App. 7, 16, 972 P.2d 101, *rev. denied*, 138 Wn.2d 1010 (1999). To be successful, a challenger must establish that a "willful and unreasoning action, without consideration and in disregard of facts and circumstances" was taken. *Id.* "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.*

Decisions related to the management of district buildings are administrative, policy-making decisions, not quasi-judicial decisions. Thus, in considering this case, the Superior Court was to review the matter under the arbitrary, capricious or contrary to law standard, providing substantial deference to the School Board as the administrative fact finder, and presuming that the School Board's decisions were correct.

At the outset, it should be noted that Appellants' constitutional claims, including their separation of powers and access to courts arguments, were not and are not properly raised in an appeal filed pursuant to RCW Chapter 28A.645. Courts have specifically identified the types of cases that cannot be raised as appeals under RCW Chapter 28A.645 or its identical predecessor

statute, RCW 28A.88.010. For example, tort claims, trade name infringement suits, disputes about a school district's statutory powers to enter into lease agreements, and civil rights actions may not be brought as appeals pursuant to the statute. *Derrey v. Toppenish School Dist.*, 69 Wn.App. 610, 849 P.2d 699 (1993) (negligent misrepresentation tort claim); *Mt. View Sch. v. Issaquah Sch. Dist.*, 58 Wn.App. 630, 794 P.2d 560 (1990) (trade name infringement claim); *State St. Office Bldg. v. Sedro Woolley Sch. Dist.*, 57 Wn.App. 657, 789 P.2d 781 (1990) (breach of oral contract to lease a building); *Nieshe v. Concrete Sch. Dist.*, 129 Wn.App. 632, 127 P.3d 713 (2005) (civil rights claim). This is because the school board appeals statute applies only to "decisions **that the school board has the authority to decide in the course of administering the school.**" *Derrey*, 69 Wn.App. at 614 (quoting *Mtn. View Sch.*, 58 Wn.App. at 633 (emphasis in original)).

The School Board did not have the authority to determine if it violated the constitution, nor did it have the authority to render decisions on issues of separation of powers or access to courts. If Appellants wish to file a constitutional challenge regarding how the District assembles or certifies administrative records, they could have do so. Such a challenge would be made under the Superior Court's original jurisdiction, and not as an appeal raised under RCW Chapter 28A.645. Thus, Appellants constitutional claims, including their separation of powers and access to courts

arguments, were never properly before the Superior Court, nor are they properly raised here on appeal.

**2. Standard of Review for the Denial of Appellants' Summary Judgment Motion and Granting of District's Partial Motion to Dismiss**

The focus of this appeal is on the denial of the Appellants' 2009 motion for summary judgment and the granting of the District's motion to dismiss certain Appellants for lack of standing. A motion for summary judgment presents a question of law reviewed de novo on appeal. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006), *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068, 1073 (2002). In reviewing a decision on a motion for summary judgment, the appellate court is to construe the evidence in the light most favorable to the non-moving party, and the ruling must be made based solely on the record before the trial court at the time of the motion for summary judgment. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), *Wn. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993). When the material facts of a case are undisputed and the trial court considered the pleadings submitted by all parties, an order granting a motion to dismiss for lack of standing is akin to summary judgment. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Thus, both the denial of Appellants' summary judgment motion and the granting of the

District's partial motion to dismiss are reviewed de novo, with the evidence being construed light most favorable to the District on the Appellants' motions, and to the Appellants on the District's motion.

**3. Standard of Review for the Decision to Exclude the Auditor's Report**

Contrary to Appellants claims, the Auditor's Report was not filed "in conjunction with [a] review of a motion for summary judgment." *Opening Brief at 26*. Appellants' failed summary judgment motions were filed in the late summer of 2009. See *CP 132-50*. The Auditor's Report was submitted by Mr. Stafne in August of 2010, in advance of the hearing on the merits. *Id. at 890-948*. Thus, the standard of review related to the exclusion of this document from consideration at the hearing on the merits is that of abuse of discretion, not de novo. *City of Auburn v. Hedlund*, 165 Wn.2d. 645, 654, 201 P.3d 315 (2009).<sup>6</sup>

**B. The Superior Court's Orders Directing Supplementation were Appropriate Remedies to Address the Sufficiency of the Record**

The Appellants claim that the Superior Court should have granted their motion for summary judgment related to the contents of the administrative record rather than direct the District to supplement the record. As was identified by the Supreme Court

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<sup>6</sup> There was never a motion for a extension of time filed in this case. Thus, there is no need to consider what standard of review would be applied to a decision on such a motion.

Commissioner, the Appellants' arguments regarding the interpretation and application of RCW 28A.546.020 are not supported "in the decisions they cite," and are "contrary to decisions involving predecessor statutes." *Id. at 850.*

RCW 28A.645.020 states that "[w]ithin twenty days of service of the notice of appeal, the school board, at its expense, or the school official, at such official's expense, shall file the complete transcript of the evidence and the papers and exhibits relating to the decision for which a complaint has been filed. Such filings shall be certified to be correct." The statute is silent about whether or how the transcript of evidence is to be kept prior to appeal. There is no express requirement that records "relating" to every potential school board decision must be kept in a central repository and maintained on an ongoing basis as Appellants suggest. The fact that RCW 28A.645.020 allows twenty days to compile the record actually suggests that the Legislature did not intend for every school district to maintain on an ongoing basis a central repository of all records "relating" to each potential school board decision that is available to all school board members at the time the board makes each decision. If such a record keeping procedure was intended, the record could be filed on a moment's notice if a school board decision is appealed; there would be no need for the twenty day period set forth in RCW 28A.645.020. Additionally, Appellants have erroneously implied that the District must specifically identify

what directors considered as part of their decision making process. Such a contention is unsupported by law. See *City of Lake Forrest Park v. State of Washington Shorelines Hearings Bd.*, 76 Wn. App. 212, 217-18, 884 P.2d 614 (1994).

No appellate court has directly interpreted the requirements of RCW 28A.645.020; however, there are published decisions interpreting similar statutes that are in direct conflict with Appellants' position that disputes regarding the record make the underlying decision by the School Board void. RCW 28A.405.330 and its predecessors, RCW 28.58.470 and RCW 28A.58.470, require a school district to "at its expense file the complete transcript of the evidence and the papers and exhibits relating to the decision complained of, all properly certified to be correct" when a certificated teacher is appealing an adverse change in position. There are two cases interpreting these statutes, *Hattrick v. North Kitsap School District*, 81 Wn.2d 688, 504 P.2d 302 (1972), and *Weems v. North Franklin School District*, 109 Wn. App. 767, 37 P.3d 354 (2002). Both of these cases support the Superior Court's decision to deny Appellants' motion for summary judgment related to the administrative record and to instead order supplementation by the District. That Appellants failed to identify these cases in their opening brief reflects a continued fundamental misunderstanding of the law relevant to this issue.

In *Hattrick*, a teacher sought Superior Court review of a school board's decision to not renew his employment contract. 81 Wn.2d at 668. The school board had held a series of hearings related to the decision not to renew the teacher's contract, and had a court reporter present at the hearings taking notes. *Id.* at 669-70. However, when the teacher appealed the decision to Superior Court, the school board did not file the court reporter's notes. *Id.* The teacher filed for summary judgment alleging that the decision of the school board should be overturned because of this failure. *Id.* at 669. The Supreme Court agreed that the school board was obligated to have the court reporter's notes transcribed and filed at its own expense, but did not agree that the underlying decision should be overturned as a result. *Id.* at 670. The Court ruled that the appropriate remedy was for the school board to submit the hearing transcripts, and for the Superior Court to consider the merits of the matter thereafter. *Id.* at 671.

In *Weems*, a special education director argued that the Superior Court's decision to uphold his termination should be reversed based upon the absence of a complete administrative record. 109 Wn. at 773. The special education director had been terminated for falsification of documents, and was appealing a hearing officer's decision holding that there was probable cause for the termination. *Id.* The hearing officer had taken testimony from several witnesses, and when the special education director

appealed the decision to Superior Court, the testimony from one witness was missing. *Id.* The special education director raised the issue of the missing testimony to the Superior Court, who then allowed the testimony to be retaken, and allowed for the submission of a stipulation from the school district regarding the characterization of the testimony given at the initial hearing. *Id.* The Court of Appeals expressly rejected the special education director's arguments that the *Hattrick* ruling stood "for the proposition that failure to provide the record requires a reversal of the termination." *Id.* at 774. The Court of Appeals identified that instead, "the usual remedy for defects in the record should be to supplement the record." *Id.* (quoting *State v. Miller*, 40 Wn.App. 483, 488, 698 P.2d 1123 (1985)).

Another illustrative case is *M/V La Conte, Inc. v. Leisure*, 55 Wn.App. 396, 777 P.2d 1061 (1989). In that case, the plaintiffs were seeking a reversal of a judgment for failure by the trial court to have a court reporter transcribe post-trial proceedings. *Id.* at 402. The Court agreed that the statute at issue required the trial court to have the post-trial proceedings transcribed. *Id.* However, the Court rejected the argument that failure to provide the transcription would result in an automatic reversal and remand, holding instead that it was "appropriate to treat a violation of the statute in the same manner as any other defect in the record." *Id.* at 403.

In this matter, Appellants make the same argument regarding the application of the *Hattrick* decision that was expressly rejected in *Weems*. As explained in both *Hattrick* and *Weems*, the appropriate remedy when a concern is raised regarding the completeness of an administrative record provided by a school board under a statutory directive to provide a complete record is supplementation, not a ruling overturning the underlying decision.

The administrative record as initially submitted by the District contained all of the documents required to be generated under the law and policy related to school closures; Agendas, Presentations, Resolutions, Motions, and Meeting Minutes from all School Board meetings and work sessions where building closures and programmatic changes were discussed; invoices for newspaper advertisements of meetings and hearings; print-outs of the website maintained by the District related to closures and programmatic changes; as well as public input in the form of verbatim transcription of testimony given at all public hearings, summaries of emails, summaries of comment cards and input offered at public workshops, and digital video recordings of public testimony offered at School Board meetings.

These materials were submitted in the format in which they were contemporaneously maintained and made available to both the School Board and the public, and were certified by the lead staff member working on the matter. The Superior Court ordered

supplementation of the record to address Appellants concerns, and the District complied with such orders by submitting verbatim transcriptions of public testimony offered at School Board meetings in addition to the already provided digital video recordings, and individual comment cards, emails, and other written communications in addition to the already provided summaries.<sup>7</sup>

Appellants repeated citations to *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991) and *Magna v. Hyundai Motor America*, 167 Wn.2d 570, P.3d 191 (2009) are dubious in that both of those cases involve matters of the exercise

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<sup>7</sup> The Superior Court relied on *Bennett v. Board of Adjustment of Benton County*, 23 Wn.App. 698, 597 P.2d 939 (Div. 2, 1979) in determining that the District was required to transcribe the School Board meetings, even though the meetings themselves were already part of the record in digital video disk form. While the District fully complied with the supplementation directive, it believes that the decision to require it to transcribe meetings was erroneous. In *Bennett*, Division Two of the Court of Appeals ruled that in order to satisfy the requirements for a record on a writ of review for an "action [that] is adjudicatory in nature," an agency needed to provide a written transcript, a transcript that could be a verbatim report, a narrative report, or an agreed report of proceedings. *Id.* 700-01. Unlike in *Bennett*, the decision being challenged was a policy-making decision, not a quasi-judicial adjudicatory decision. See *Haynes*, 111 Wn.2d at 253-54. Additionally, unlike in *Bennett*, the District did not just provide digital video disks of School Board meetings, it provided among other things, Agendas, Presentations, Resolutions, Motions, and Meeting Minutes; summaries of feedback received at work shops and by email; and verbatim transcripts of the public hearings required under statute and policy. The Meeting Minutes are narrative reports of the relevant meetings, and the summaries of public feedback obtained at workshops and via email narrative reports of public commentary received. In *Bennett*, narrative reports were identified as an option for creating an appropriate record. In addition, the District provided verbatim transcripts of required hearings, meeting a second option identified for creating a record in *Bennett*. Regardless, disagreement with the Superior Court's order did not prevent the District from honoring the supplementation directive and moving the case forward.

of a Superior Court's original jurisdiction, and neither directly speak to the situation at hand in the same way that the *Hattrick* and *Weems* decisions do. Additionally, the facts of *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973), a land-use case cited by Appellants, are very different than the case at hand. In *Loveless*, the issue was that the audiotapes of planning commission and subsequent county commission meetings were not clear and could never be made clear. 82 Wn.2d 762-63. The Court opined that because the only record was the audiotapes, and they were not available for review, the record was inadequate to affirm the commissions' rulings. In this matter, there is no question that the District provided both digital video records of the School Board meetings, along with written verbatim transcriptions.

This case is far more akin to *Weems* and *Hattrick* – other school law cases - than the zoning matter relied on by Appellants. Appellants failed to establish how the denial of their summary judgment order but the entry of supplementation orders was erroneous when decisions interpreting the only statutes similar to RCW 28A.645.020 mandate exactly such an outcome.

After the Supreme Court rejected Appellants' arguments regarding the propriety of the supplementation of the record, Appellants then began challenging the form of the certifications provided. Appellants arguments regarding the certification of the record are based on an entirely false premise, being that the

District was not willing to certify the administrative record. Ms. Ferguson initially certified the Transcript of Evidence, stating that "I, Holly Ferguson, certify that the attached documents and digital video disks constitute the 'transcript of the evidence and the papers and exhibits relating to the decision' of the Seattle School Board to close five school buildings for instructional purposes." At the direction of the Superior Court, the District then submitted the individual emails, comment cards, and letters as part of "the papers and exhibits relating to" the closure decisions (in addition to the summaries of the same that were included and certified initially), and had each producer attest that the documents provided were true and correct copies. When each verbatim written transcription of School Board meetings was filed (in addition to the digital video recordings that were included and certified initially), they were accompanied by a certification of the transcribing court reporter.

Appellants make the overly formalistic argument that because Ms. Ferguson's initial certification does not use the word "correct," the terms of RCW 28A.645.020 have not been met. Such an argument is disingenuous in light of the actual wording of the certifications provided and the wording of the statute itself. Ms. Ferguson, Mr. Redman, Ms. Oakes, Ms. Johnson, Ms. Carter, and the various court reporters all offered appropriate attestations regarding the materials they produced. The Appellants cite no

case, nor does one exist, that holds that a certification pursuant to RCW 28A.645.020 must include the exact phrase "to be correct."

The Superior Court correctly followed the law as set forth in *Hattrick*, *Weems*, and *M/V La Conte* in denying the Appellants' summary judgment motion and ordering supplementation. Appellants offer no relevant case law to support this Court reaching a different outcome. The Superior Court's decision to deny Appellants summary judgment motion should be upheld.

**C. Appellate Subject Matter Jurisdiction was Conferred to the Superior Court when Appellants timely filed their Notice of Appeal pursuant to RCW 28A.645.010**

Appellants' claim that RCW 28A.645.020 is a jurisdictional provision is also without merit. It is another provision, RCW 28A.645.010, that sets forth the Chapter's jurisdictional provisions:

Any person, or persons, either severally or collectively, aggrieved by any decision or order of any school official or board, within thirty days after the rendition of such decision or order, . . . may appeal the same to the superior court of the county in which the school district or part thereof is situated, by filing with the secretary of the school board . . . , and filing with the clerk of the superior court, a notice of appeal which shall set forth in a clear and concise manner the errors complained of.

Courts have consistently ruled that compliance with RCW 28A.645.010 confers subject matter jurisdiction. *Clark v. Selah Sch. Dist.*, 53 Wn. App. 832, 83637, 770 P.2d 1062 (1989), *Haynes*, 111 Wn.2d at 251 (interpreting identical predecessor

statute); *Derrey*, 69 Wn. App. 610, and *Schmidtke v. Tacoma Sch. Dist.*, 69 Wn. App. 174, 848 P.2d 203 (1993).

In contrast, the statute governing the filing of the administrative record for RCW Chapter 28A.645 appeals is not jurisdictional. RCW 28A.645.020 simply instructs school districts that upon receipt of an appeal invoking the Superior Court's appellate subject matter jurisdiction to file a "complete transcript of the evidence and the papers and exhibits relating to the decision for which a complaint has been filed." Filing of the record facilitates judicial review, but it is not a jurisdictional prerequisite for bringing an appeal as set forth in RCW 28A.645.010.

It is undisputed that Appellants complied with RCW 28A.645.010 by filing their Notices of Appeal with the District and the Clerk of the Court on March 2, 2009. It was that compliance that conferred subject matter jurisdiction to this Court. Under Appellants' theory, the Superior Court lacked jurisdiction to rule on any of the motions filed, including their summary judgment motion. Appellants' strained argument that appellate courts do not obtain subject matter jurisdiction over an appeal until after the record below is filed is simply wrong. See, e.g., RAP 7.2(a) and 7.3.

Appellants reliance on *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn.2d 464, 832 P.2d 1310 (1992) for the proposition that there is no subject matter jurisdiction and thus they should prevail is misplaced. That matter involved a challenge

to the adoption of agency rules. However, unlike state agencies, school districts are not required to maintain rule-making files in the manner called for under the Administrative Procedure Act every time a policy decision is made. They are instead obligated to maintain records under the Public Records Act, and to produce an administrative record if a decision is challenged. *Compare* RCW 34.05.310-34.05.395 *with* RCW 42.56.070 *and* RCW 28A.654.020.

Appellants also ignore that a decision that subject matter jurisdiction is lacking can only result in one outcome: that the case be dismissed in its entirety. *Inland Foundry Co., Inc. v. Spokane County Air Pollution Control Auth.*, 98 Wn.App. 121, 123-24, 989 P.2d 102 (1999) ("Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal."). That dismissal is the only action that a court lacking subject matter jurisdiction has the power to take is a long held and undisputed point of law. *See e.g. Matter of Adoption of Buehl*, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976) ("Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power. It is the authority of the court to hear and determine the class of actions to which the case belongs. A court lacking such jurisdiction may do nothing other than enter an order of dismissal") (internal citations omitted); *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) ("Lack of jurisdiction over the subject matter

renders the superior court powerless to pass on the merits of the controversy brought before it."); *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003) ("When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take."); and *Biomed Comm., Inc. v. State Dept. of Health Bd. of Pharmacy*, 146 Wn.App. 929, 934, 193 P.3d 1093 (2008) ("Where a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take"). Thus, if Appellants were correct, this action must be dismissed in its entirety.

The Superior Court correctly rejected Appellants arguments related to subject matter jurisdiction below. Appellants offer no law to support their claim that a matter raised under RCW 28A.645 can be remanded back to a School Board for further action when there is no subject matter jurisdiction for the matter to be heard in Superior Court. The Superior Court's decision should be upheld.

**D. The Superior Court Correctly Determined that a Number of the Named Appellants Lacked Standing**

Appellants Briggs, Changebringer, Davis, Driver, and Grauer were dismissed from this action for lack of standing on June 1, 2010, because they were not parties actually impacted by the decisions they were seeking to challenge. *CP at 858-60*. Standing is a prerequisite requirement that must be met before a claim can properly be heard. As was explained by the U.S. Supreme Court, "the question of standing is whether the litigant is entitled to have

the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Appellants attempt to mislead this Court by claiming that they have "standing to challenge the District's procedures pursuant to RCW 28A355.020 and RCW Chapter 28A.645.020." That is not the subject matter for which they were required to have standing. Each and every Appellant was required at the outset to establish that he or she had standing to challenge the School Board's closure and relocation decisions. Disputes about the record were irrelevant to the initial threshold determination of if a particular Appellant had standing to raise an appeal of the School Board's January 29, 2009 decisions under RCW 28A.645. Appellants' position is akin to claiming that automatic standing is conferred in any case where the parties are having a discovery dispute. That is simply contrary to law. Each and every Appellant was required to establish that they had standing to bring the action under RCW 28A.645 in the first place, regardless of any subsequent disputes regarding the record.

The Superior Court correctly determined that Appellants Briggs, Changebringer, Davis, Driver, and Grauer could not "satisfy the standing test applicable to this type of jurisdiction." *Coughlin v. Seattle School District*, 27 Wn.App. 888, 621 P.2d 183 (1982). RCW 28A.645.010 requires that a person be "aggrieved by" a decision of the school board or a school official in order to pursue an action. In *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605

(2003), the Supreme Court stated that an “aggrieved party” is “one whose personal right or pecuniary interests have been affected.” *Id.* No person has a right to have their child attend at any particular school building. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 453, 495 P.2d 657 (1972). Consequently, a person cannot claim to be “aggrieved by” a school board decision by claiming that they wanted a child to attend a particular school.

“[T]he rules of standing have been promulgated by the legislatures and the courts to regulate access to the judicial process.” *Coughlin*, 27 Wn.App. at 893-95. These rules of standing require that: (1) a would-be litigant has suffered a concrete injury in fact that is “actual or imminent,” not “conjectural” or “hypothetical;” (2) there is a traceable causal connection between the injury and the complained-of-conduct; and (3) “it must be ‘likely,’ as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Appellants below and again in their Opening Brief erroneously ask the Court to apply the statutory test for standing set forth in the Washington Administrative Procedure Act (APA). The APA does not apply to school board decisions, the procedures that govern an appeal of a school board decision are those contained within RCW 28A.645. Regardless, the standing test set forth for APA “is drawn from and explained by federal case law,”

namely the *Lujan* factors. *Allan v. University of Washington*, 140 Wn.2d 323, 327-33, 997 P.2d 360 (2000).

Appellants Briggs, Changebringer, Davis, Driver, and Grauer could not and cannot establish that they have suffered a concrete injury in fact that is “actual or imminent,” not “conjectural” or “hypothetical.” Appellant Briggs and her children reside within the boundaries of the Tukwila School District. *CP at 712*. The District does accept some applications from students who live outside of the District boundaries who are seeking to attend District schools. *Id. at 711-12*. The length of acceptance for a non-resident student per School Board Policy and State regulation is one year only. *Id.* As the enrollment for non-resident students are from year to year only, the enrollment for any non-resident student who was accepted and attended Seattle Public Schools for the 2008-2009 school year ended on June 19, 2009. *Id.* All non-residents were required to seek admission for the 2009-2010 school year, including those who had attended the District previously. *Id.* While the submission of a non-resident enrollment application is a necessary precursor to acceptance, submission of an application does not ensure acceptance, even for students who have attended as non-residents in the past. *Id. at 712*. More than 250 non-residents who sought enrollment for the 2009-2010 school year were not accepted, including many non-residents who attended in prior years. *Id.*

Appellant Briggs sought non-resident admission into the District for her son Troy Washington for the 2008-2009 school year. *Id. at 712.* He was accepted to attend African American Academy, with the express direction that “this acceptance is for the 2008-2009 school year only.” *Id.* Appellant Briggs did not seek non-resident admission into the District for Troy Washington for the 2009-2010 school year. *Id.* As the District had no obligation to accept Appellant Briggs’ non-resident son to any District school in the future, and she did not actually seek non-resident admission for her past the 2008-2009 school year, she was not able demonstrate any perceptible present or future harm she suffered by the January 29, 2009 decisions of the School Board that make her an “aggrieved” party with standing to challenge those decisions.

Appellant ChangeBringer is a parent of Connor ChangeBringer-McCoy, Appellant Grauer is a parent of Molly Grauer, and Appellant Driver is the parent of Griffin Driver. Connor Changebringer-McCoy, Molly Grauer and Griffin Driver attended AS#1 for the 2008-2009 school year. *CP 712.* Connor ChangeBringer-McCoy and Molly Grauer were originally assigned to AS#1 for the 2009-2010 school year, but were subsequently released to attend school in another district. *Id.* Appellant Davis is a parent of Michaela Davis-Joy, a student who attended Madrona K-8 for the 2008-2009 school year, who received Home Based Instruction at the time the motion to dismiss was filed. *Id. at 712.*

Neither AS#1 nor Madrona K-8 was among the five schools approved for closure by the School Board on January 29, 2009, nor were they impacted by the nine programmatic changes made. As Appellants Changebringer, Davis, Driver, and Grauer did not have children attending the closed or impacted schools; the Superior Court correctly determined any harm to them was also purely hypothetical and does not rise to the level of an injury in fact. *C.f. Seattle School Dist. v. State*, 90 Wn.2d 476, 494, 585 P.2d 71, 82 (1978) (concluding that the parents of children and children who were “each is enrolled in and attend[ing] one of the public schools within the District” had standing to raise a challenge to Washington’s funding of public education for resident district students). The decision to dismiss Appellants Changebringer, Davis, Driver, and Grauer for lack of standing should be upheld.

**E. The Superior Court Properly Excluded Irrelevant, Unauthenticated Hearsay**

As set forth above, the Superior Court's decision to exclude a report from the Washington State Auditor's Office that was submitted along with Mr. Stafne's "Second Limited Notice of Appearance" from consideration at the administrative review hearing is reviewed under the standard of abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *Boguch v. Landover Corp.*, 153 Wn.App. 595, 619, 224 P.3d 795 (2009).

“[D]iscretion is abused only where no reasonable person would have taken the view adopted by the trial court.” *Carle v. McChord Credit Union*, 65 Wn.App. 93, 111, 827 P.2d 1070 (1992).

In any matter before Washington courts, affidavits or declarations must be based upon personal knowledge and set forth facts that would be admissible as evidence at trial. See Civil Rule 56(e), *Blomster v. Nordstrom, Inc.*, 103 Wn. App 252, 11 P.3d 883 (2000). Lay witnesses are generally not allowed to offer opinion testimony. ER 701. Documents that are being submitted as evidence must be established to be authentic. ER 901(a). However, authentication is just one step in the evidentiary foundation for the admissibility of evidence that all parties are required to follow before introducing. *In re Connick*, 144 Wn.2d 442, 28 P.3d. 729 (2001). Properly admissible evidence must also be relevant to the action at hand. ER 402 ("Evidence which is not relevant is not admissible"). Additionally, any hearsay statement, even if in an authenticated document, must meet a specific exception to be admissible. ER 802.

RCW 43.09.180 does not provide that Auditor's records are automatically admissible as evidence, as Appellants argued below. This statute specifically provides that:

The state auditor shall keep a seal of office for the identification of all papers, writings, and documents required by law to be certified by him or her, and copies authenticated and certified of all papers and

documents lawfully deposited in his or her office shall be received in evidence with the same effect as the originals.

RCW 43.09.180. Thus, RCW 43.09.180 merely provided that certified copies of documents contained within the auditor's records would be considered to be the same as originals. RCW 43.09.180 simply removed one step and not the entire foundation for the admissibility of Auditor's Report. The Auditor's Report also needed to meet all other evidentiary requirements to be properly admissible. Appellants did not advance a separate evidentiary foundation for the contents of the Auditor's Report below, and there can be no dispute that the contents of the report are out-of-court declarations offered into evidence to establish the truth of the matters asserted therein contrary to ER 801.

In *State v. Monson*, 113 Wn.2d 833, 748 P.2d 485 (1989), the Supreme Court addressed the admissibility of the contents of documents like the report at issue. In that matter, the Monson was appealing a conviction for driving while license suspended after the trial court admitted a certified copy of his driving record to establish that, at the time of his arrest, his driver's license was suspended. *Id.* at 835. Monson claimed that the admission of the certified copy of his driving record was an error because, among other things, it was inadmissible hearsay. *Id.* The Supreme Court ruled that because the document contained easily verifiable facts such as the dates of a traffic infraction, conviction, revocation, and

reinstatement, as opposed to expressions of opinion or judgment, it met the requirements of the public records exception to the hearsay rule, RCW 5.44.040. The Supreme Court explained that “in order to be admissible under RCW 5.44.040, a public document must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion.” *Id.* at 839.

In contrast with the certified copy of the driving record at issue in *Monson*, the Auditor’s Report offered below was teeming with conclusions, the judgment of the Auditor, and expressions by the Auditor regarding the law, the District’s ability to follow the law, and whether or not the District conformed to standards that the Auditor opined were appropriate. Consequently, the Auditor’s Report did not fit within the public records exception. The decision to exclude the Auditor’s Report was not an abuse of discretion.

**F. This Case is Moot**

Whether a case has become moot is a matter of jurisdiction, thus can be raised at any point during the litigation. *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845, 851 (1983); CR 12(h)(3). This matter is moot because the relief requested is no longer available, given that the decisions being challenged have long been fully implemented. See e.g. *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (“A case is moot if a court can no longer provide effective relief.”).

A case that is significantly similar to this matter is *Willet v. Russell*, 133 Wn.2d 88, 233 P. 293 (1925). In *Willet*, a plaintiff sought an injunction to restrain Seattle officials from proceeding with construction of a power substation. By the time the case reached the Supreme Court, construction of the substation was completed, as there had been no restraining order or temporary injunction issued by the lower court. The Court held that “[m]anifestly, therefore, there is now nothing to enjoin, and the controversy for all practical purposes has ceased to exist...[s]hould we proceed to dispose of the cause upon the merits, it is now manifest that we would be but deciding a moot question.” *Id.* at 89. See also *Royce v. Public Utility Dist. No. 1 of Clark County*, 26 Wn.2d 733, 736, 175 P.2d 624 (1946) (“In the absence of any restraining order or temporary injunction, respondents were at all times free to execute the contract. This they elected to do. Having done so, there is now nothing to be enjoined. This court will not consider on appeal questions which have become moot.”); *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940) (explaining the purpose of injunctive relief).

Here, the Appellants also sought injunctive relief as an ultimate remedy, but did not file either a motion for a temporary restraining order or a motion for preliminary injunctive relief. The District made its intention to immediately begin implementing the School Board’s January 29, 2009 decisions known, and

unconstrained by any preliminary injunction, fully implemented the decisions. As a result, the injunctive relief originally sought is no longer available as the plan has been carried out. Consequently, as in *Willet*, "there is now nothing to enjoin," and any review of this case is a purely academic venture.

#### **V. Conclusion**

The Superior Court did not err in its denial of Appellants' summary judgment motion regarding the administrative record, nor did it err in its granting of the District's partial motion to dismiss for lack of standing. The Superior Court correctly determined it had subject matter jurisdiction, and did not abuse its discretion when excluding an irrelevant document rife with inadmissible hearsay. Even if Appellants had set forth some basis for the Superior Court's decisions to be overturned, this case should still be dismissed as moot because the relief sought cannot be granted.

RESPECTFULLY SUBMITTED this 24th day of March, 2011.

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By 

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Attorneys for Seattle School District No. 1

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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of:

1. Respondent Seattle School District's Responsive Brief;
2. District's Supplemental Designation of Clerk's Papers; and a copy of this
3. Declaration of Service;

directed to the following individuals:

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DATED at Seattle, Washington, this 24<sup>th</sup> day of March, 2011.

  
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Annette Y. Kim, Legal Assistant

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